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No.

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1979

JEFFREY RICHARD ROBBINS,
Petitioner,

vs.

STATE OF CALIFORNIA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
to the Court of Appeal, State of California,
First Appellate District

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QUESTIONS PRESENTED

1. When this Court vacates a state judgment and mandates the state court to reconsider its judgment, does the state court violate the mandate when it re-instates its judgment on new grounds not encompassed within the prior judgment or the mandate of this Court?

2. Are the Fourth and Fourteenth Amendments violated by warrantless searches of private property other than luggage when such property has been immobilized during a highway stop and arrest?

3. What constitutional limits apply when inferences drawn from the appearance of a closed package or container are used to avoid the Warrant Requirement?

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Petitioner, Jeffrey Richard Robbins, respectfully prays that a writ of certiorari issue to review the judgment of the Court of Appeal of the State of California in and for the First Appellate District (1/Crim. 14387) entered in this matter on March 24, 1980 as a result of this Court's June 25, 1979 mandate in Robbins v. State of California, No. 78-567.

OPINION BELOW

The opinion of the Court of Appeal of the State of California, First Appellate District and the order of the Supreme Court of California on July 5, 1978, denying a petition for hearing, are reproduced in the appendix.

JURISDICTION

This court's jurisdiction is invoked under 28 U.S.C. §§ 1257 and 2101, this being a petition arising out of a state criminal conviction. The petition is filed within 90 days of April 30, 1980.

CONSTITUTIONAL PROVISION AT ISSUE

Amendment IV:

> The right of the people to be secure in their persons, houses, papers and effects, against unreasonable search and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

The facts we state are undisputed in the record unless otherwise indicated.[1]

The Stop

On January 5, 1975 at 1:45 a.m., while traveling along Interstate 80 in the foggy and very cold morning hours, Officer DePue of the California Highway Patrol observed petitioner's stationwagon, between one tenth and one quarter mile distant, traveling on Nelson Road. (R.T.S. 4:16-28, 9:26-27, 5:1-7; R.T. 65:6-9)

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[1]The following designations have been used in this brief: P.H. (Reporter's Transcript of Preliminary Hearing); R.T.S. (Reporter's Transcript of Special Suppression Hearing); R.T. Reporter's Transcript on Appeal); R.T.J.S. (Reporter's Transcript of Judgment and Sentencing); C.T. (Clerk's Transcript).

Despite the difficult viewing conditions, which limited visability to one quarter of a mile, Officer DePue formed an opinion that petitioner was driving too slowly. (R.T.S. 6:2-3) It was later established that this opinion was mistaken and based upon DePue's mistaken belief that the speed limit on Nelson Road was much higher than it actually was. (R.T. 202:13-28, 229:26-239:9, 240:5-241:19)

Viewing the distant scene in this false light, DePue likewise believed he observed petitioner twice cross over the broken yellow road line, once three feet and once a full vehicle width. (R.T. 6:9-16, 7:24-8:4) DePue, however, never testified that his limited view of the distant scene allowed him to determine whether these alleged maneuvers were in violation of law.

Upon exiting the freeway Officer DePue and his partner, Officer Stoltz, stopped petitioner to question him about his driving. Since the road did not have a shoulder, petitioner's vehicle was stopped in the middle of the right hand roadway. (R.T. 75:8-19)

Petitioner stepped out of his stationwagon and produced his driver's license. (R.T.S. 8:11-22) Asked to produce a registration, petitioner returned to his car and proceeded to look for the registration. (R.T.S. 8:25-28) While the door was opened Officer DePue detected the odor of burned marijuana. (R.T.S. 9:28-10:21) Immediately upon receiving petitioner's registration, DePue arrested petitioner for driving under the influence of marijuana. (R.T.S. 20:20-25, 9:16-17)

The Automobile Search

A search of the passenger compartment then followed. Several entries were made into the vehicle which yielded evidence to support the basis for the arrest: two pairs of tweezers, one with a hand-rolled cigarette butt, and a cookie tin containing cigarette papers and approximately ⅛th oz. of marijuana. (R.T.S. 11:27-12:9, R.T.S. 17:17-18:12, P.H. 25:4-5)

While this search took place Robbins was kept spread-eagled against his still-running car, breathing in the fumes from its exhaust. (P.H. 7:11-16, R.T.S. 10:21-25, R.T. 80:17-18) At some point he was overcome by these fumes and fell into the middle of the oncoming roadway, where he vomited.

Still standing outside in what Officer DePue described as a very cold night, Robbins was swallowing rapidly and perspiring profusely. (R.T.S. 14:15-16, 9:26-27) He began saying irrational things and looked wild-eyed. (R.T.S. 15:12-17, P.H. 26-28) He was then handcuffed, and while DePue continued the search, Stoltz questioned Petitioner in order to complete a lengthy vehicle impoundment form. (R.T.S. 15:12-28) Shortly thereafter, and after Robbins learned of the search of the cookie tin, Robbins allegedly stated to Sergeant Stoltz, "What you are looking for is in the back." (R.T.S. 15:26-26:6, R.T. 120:23-25) Robbins was then removed from the cold and placed in the patrol vehicle. (R.T. 50:8-12)

The Luggage Search

Removing the keys from the petitioner's ignition, DePue unlocked and opened the tailgate of the wagon. (R.T.

50:13-15) Picking up the floor rug, DePue discovered a luggage compartment under the floor in the rear deck of the wagon. (P.H. 22:16-18) Pulling a handle set flush into the deck, DePue opened the luggage compartment and observed therein two pieces of luggage and two sealed packages. (*Id.* P.H. 23:7-24:6)

DePue proceeded to open up these items. He first opened up a brown leather tote bag and discovered a masonry jar and three white plastic bags, each of which was double taped. (R.T. 133:6-7) After they were opened these items were found to contain a total amount of marijuana in excess of one pound. (P.H. 25:9-13)

DePue next removed and opened a brown leather briefcase and rummaged through petitioner's clothing. (P.H. 13:17-18, R.T. 54:28-55:9) DePue then removed a package wrapped in opaque green plastic and sealed closed. (P.H. 13:28-14:21, R.T. 57:20-17)

Justice Rattigan of the California Court of Appeal provides a vivid description of this package:

"The package visible in the photograph is apparently wrapped or boxed in an opaque material covered by an outer wrapping of transparent, collophane-type plastic. (The photograph is not in color, and the "green" plastic cannot be seen at all.) Both wrappings are sealed on the outside with at least one strip of opaque tape. As thus wrapped and sealed, the package roughly resembles an oversized, extra-long cigar box with slightly rounded corners and edges. It bears no legend or other written indicia supporting any inference concerning its contents.

"The photograph thus presents to me the visual impression of a package that had been tightly wrapped for

shipment by mail, or to protect its contents, or for both purposes. For all that I see, it could contain books, stationery, canned goods, or any number of other wholly innocuous items which might be heavy in weight. In fact, it bears a remarkable resemblance to an unlabelled carton of emergency highway flares that I bought from a store shelf and have carried in the trunk of my own automobile."

Upon opening this package DePue discovered a block of marijuana weighing approximately fifteen pounds. (P.H. 25:6-8) Finally, DePue removed and opened a similar package containing approximately the same amount of marijuana. (*Id.*)

The Proceedings In The Trial Court

Petitioner was charged with counts of possession of marijuana, possession of marijuana for sale, transportation of marijuana, and driving under the influence of a drug.

On January 14, 1975 during the preliminary hearing in the municipal court, petitioner's counsel orally objected to the introduction into evidence of all articles taken during the warrantless search of the trunk. (P.H. 26) The court reserved counsel's objection but permitted the items to be received in evidence. (P.H. 26-27)

At the preliminary hearing the District Attorney elicited from DePue a statement that he had heard that contraband is sometimes packaged the way the two parcels were packaged. DePue, however, said he hadn't seen this himself (in all of his eight years with the Highway Patrol) and discredited this information as "merely hearsay." (P.H. 24; R.T.S. 22:9-10)

On March 24, 1976 petitioner's motion to suppress all tangible evidence as obtained in violation of petitioner's constitutional rights came on for hearing and was denied. (R.T.S. 2-37)

Petitioner was convicted of possession of marijuana, possession for sale, and transportation of marijuana, but found *not guilty* of driving under the influence of a drug. Petitioner was sentenced to prison for a term of five years to life and has been released on bail pending Supreme Court review after serving only a portion of this sentence.

Proceedings In The Appellate Courts and This Court

On May 9, 1978 the Court of Appeal, First Appellate District, reaching the merits of the Fourth Amendment contention, affirmed the conviction below. The court upheld the warrantless search of the luggage and sealed packages in the luggage compartment "as falling within the exception authorizing warrantless searches of automobiles and their contents where there is probable cause." (Opinion at p. iv, App. Petition For A Writ of Certiorari in Robbins v. State of California, No. 78-567). No other exceptions to the Warrant Clause were relied upon.

On June 25, 1979 this Court granted a petition for a writ of certiorari, ordered the judgment of the Court of Appeal to be vacated, and remanded the case to the Court of Appeal for further consideration in light of *Arkansas v. Sanders*, 442 U.S. .....; 61 L.Ed.2d 235; 99 S.Ct. 259.

On remand, the California Attorney General conceded that the warrantless search of the tote bag and cookie tin was in violation of the Fourth Amendment.

On March 4, 1980, two members of the Court of Appeal, over the dissent of Justice Rattigan, ruled that the mandate of this Court did not require the suppression of the sealed plastic packages on the ground that "the packages did not support a reasonable expectation of privacy." (Opinion at p. 6, App.) Relying upon Officer DePue's statement that he had heard that contraband is sometimes wrapped in this manner, the Court of Appeal found as follows:

> "Although a variety of legally possessable objects could conceivably be wrapped in brick-shaped, plastic-wrapped packages, legally possessable objects are not *commonly* packaged in this manner. . . . Any experienced observer could have inferred from the appearance of the packages that they contained bricks of marijuana. The parcels thus could not support a reasonable expectation of privacy and were not protected by the Fourth Amendment." (Opinion at p. 6, App.) (Emphasis in the original)

On April 30, 1980, over the dissent of Chief Justice Bird and Justice Tobriner, the California Supreme Court voted to deny a petition for hearing.

REASONS FOR GRANTING WRIT

I

THE CALIFORNIA COURT OF APPEAL HAS NOT FOLLOWED THE MANDATE OF THIS COURT

Petitioner submits that the California Court of Appeal, despite its choice of labels, has essentially sought to authorize a warrantless search on the ground that contraband was in "plain view."

The marijuana, of course, was not in plain view. Officer DePue could not see through the opaque green plastic wrap. He was not even attracted to the packages when he first saw them lying side by side with other property in the luggage compartment. Nevertheless, through the power of *hindsight,* the contents of the packages now appear obvious to two members of the Court of Appeal. Since no other recognized exception to the Warrant Clause would apply, this is tantamount to a claim that the contents of the packages were subject to the "plain view" exception.

The record of this case prior to the June 25, 1979 mandate of this Court provides absolutely no basis for such a claim. Although an objection to the warrantless search was made in the trial court, no plain view exception was claimed. (P.H. 1-28; R.T.S. 1-37). Nor was the plain view exception urged by the State of California on appeal. (Respondent's Brief, dated January 18, 1978, filed in the California Court of Appeal).

The May 9, 1978 decision of the California Court of Appeal upheld the warrantless search on one ground only, "as falling within the exception authorizing warrantless searches of automobiles and their contents where there is probable cause." (Opinion at p. iv, App. to Petition For A Writ of Certiorari, *Robbins v. State of California,* No. 78-567).

Had the plain view exception been previously raised or decided upon, petitioner might have filed a different petition to this Court, the review by this Court might have been different, a different mandate might have issued, or no mandate at all might have issued.

But this was not the case. The review of this Court was directed to a decision of the California Court of Appeal which did not encompass a claim that the search could be upheld under the plain view exception to the Warrant Clause. Petitioner submits that this should settle that issue forever. Any other result permits a lower appellate court to undermine the authority of this Court and make the review process of this Court a waste of time for both the Court and the petitioner.

Petitioner therefore submits that the California Court of Appeal is in violation of the mandate of this Court. Petitioner furthermore submits that insofar as much of this Court's workload is accomplished through mandates directing lower courts to reconsider their decisions on the basis of specified decisions of this Court, this issue is important for review.

II

ALTHOUGH THE ISSUE IS PRESENTED DAILY TO POLICE AUTHORITIES AND THE COURTS, THIS COURT HAS NOT YET ARTICULATED A CONSTITUTIONAL STANDARD FOR SEARCHES OF PRIVATE PROPERTY IMMOBILIZED BY POLICE AUTHORITIES AS A RESULT OF A HIGHWAY STOP AND ARREST

In *Arkansas v. Sanders*, 442 U.S. 753; 61 L.Ed.2d 235 (1979), this Court held that in the absence of exigent circumstances, the police are required to obtain a warrant before searching luggage taken from an automobile properly stopped and searched for contraband. But, as Justice Blackmun noted in his dissent,

> "Still hanging in limbo, and probably soon to be litigated, are the briefcase, the wallet, the package, the paper bag, and every other kind of container." 442 U.S. at ..... .

Highway searches of private property other than luggage occurs daily, however, and the issue "continues to occupy much of the attention of courts at all levels of the state and federal judiciary." *Arkansas v. Sanders*, 442 U.S. at ..... . Nevertheless, courts and law enforcement officials find it difficult to discern a clear constitutional standard for such cases. Petitioner submits that the erroneous decision of the court below resulted from this confusion and uncertainty.

Although the underlying thrust of that court's decision appeared to be to the effect that contraband was in plain view, the principles actually articulated were quite different. The Court of Appeal opinion suggests that in cases involving searches of property immobilized from a highway stop and arrest, the ultimate test is whether the property is a container which supports a "'reasonable expectation of privacy." In the hands of the Court of Appeal, however, this test is a constitutional wild card, so subjective that it provides no guidance and achieves whatever result is desired. Thus, two members of the Court of Appeal were capable of finding that there was no reasonable expectation of privacy in a package which a third member said looked like a very ordinary mail parcel.

As a Fourth Amendment standard, the concept of "legitimate expectations of privacy" is at least as old as *Katz v. United States*, 389 U.S. 347 (1967). Yet no decision of this Court has ever held it to be a test to be applied by the

officer in the field in making Fourth Amendment determinations. Some support for the notion that this might be the case in highway stop cases, however, may be found in footnote 13 of the *Arkansas v. Sanders* decision where this Court states:

> "Not all containers and packages found by police during the course of a search will deserve the full protection of the Fourth Amendment. Thus, some containers (for example, a kit of burglar tools or a gun case) by their very nature cannot support any reasonable expectation of privacy because their contents can be inferred from their outward appearance. Similarly, in some cases the contents of a package will be open to 'plain view,' thereby obviating the need for a warrant."

Some support for such a rule could likewise be drawn from the Court's references to the fact that unlike an automobile, which may be searched without a warrant, "luggage is a common repository for one's personal effects, and therefore is inevitably associated with the expectation of privacy." 442 U.S. at .....; 61 L.Ed.2d at 244; see also 442 U.S. at .....; 61 L.Ed.2d at 245.

Nevertheless, the possibility that these dicta remarks may presage a new ultimate test under the Fourth Amendment creates enormous room for confusion. Although many thousands of cases may be governed by this test, this Court has never actually ruled upon it, explained what it means, or considered its possible conflict with other Fourth Amendment principles.

In determining whether an expectation of privacy is "reasonable", to what factors must police and the courts look for guidance? The right to privacy is the "right to be

let alone" and is said to be the most comprehensive of all rights that exist. Any search of a man's private property constitutes some invasion of his privacy.

What account is to be taken for the fact that people's expectations of privacy differ, or of the many personal factors unknown to the officer which are involved in any inquiry into a privacy question? What account is to be taken of a man uses a shoe box to transport his valuables because he can't afford a briefcase; of a man uses a paper bag walking through a high crime area because he knows that an expensive piece of luggage will attract attention, or of a man who uses an uncommon package but manifests his expectations of privacy by clutching it twice as tightly and watching it more carefully than the next man?

From which perspective must the expectation of privacy appear "reasonable"? From the perspective of the person claiming the right? Or from the perspective of the officer in the field who is "engaged in the often competitive enterprise of ferreting out crime?" *Johnson v. United States*, 333 U.S. 10, 14 (1948). The California Court of Appeal, however, suggests that only the view of the highest Court counts if that Court can reasonably conclude that the trial "court could reasonably conclude that the contents of the packages could have been inferred." (Opinion at p. 5, App.)

But why should highly personal feelings of privacy, often times fused with irrationality, be weighed on a scale of open-ended reasoning? Why must the expectation of privacy appear "reasonable" to anyone so long as the

right of privacy has not been waived by placing that which could be private "in plain view"?

With this in mind, Justice Blackmun's remarks may be well taken, that

> "(T)he carving out of a special warrant requirement for one type of personal property, but not for others, will impose untoward costs on the criminal justice systems of this country in terms of added delay and uncertainty." *Arkansas v. Sanders,* 442 U.S. ..... (dissenting opinion).

The classification of containers will not solve this problem. The types of containers in which objects may be carried are potentially infinite.

As Justice Blackmun states:

> "[S]uppose the arresting officer opens the car's trunk and finds that it contains an array of containers—an orange crate, a lunch bucket, an attache case, a duffel bag, a cardboard box, a backpack, a totebag, and a paper bag. Which of these may be searched immediately, and which are so 'personal' that they must be impounded for future search only pursuant to a warrant?" 442 U.S. at .....

The decisions of California courts demonstrate these problems. In *People v. Dalton*, 24 C.3d 850 (1979), the California Supreme Court said the warrant requirement of *Chadwick* and *Sanders* fully applied to a metal tool box and a leather box with a "Longine" watch inscription, both of which were found in an automobile trunk. In *People v. Pace,* 92 C.A.3d 199 (1979), the Warrant Clause was held to apply to a lunchbox, while in *People v. Musante,* 102 C.A. 3d 156 (1980), it was held to apply to an electric blanket

box found in an automobile. And in *People v. Robbins,* herein, it was conceded by the Attorney General that there was a reasonable expectation of privacy in a cookie tin. (Opinion at p. 3, App.).

At the same time, however, the California Court of Appeal held that there was no reasonable expectation of privacy in tape-secured plastic-wrapped packages which presented to Justice Rattigan of that court "the visual impression of a package that had been tightly wrapped for shipment by mail, or to protect its contents, or for both purposes," (Dissenting Opinion at p. 11, App.) since two other Justices were of the opinion that "legally possible objects are not *commonly* packaged in this manner." (Opinion at p. 6, App.). Following this approach, some California courts have held that one has a reasonable expectation of privacy *only* if the container is of a type *commonly* used as a repository for one's personal effects. Thus, in *People v. Diaz,* 101 C.A.3d 440 (1980) the California Court of Appeal held that for this reason, there was no reasonable expectation of privacy in a closed soft drink container.[2] The court furthermore added that it disagreed with the holding in *People v. Pace, supra,* that an individual had a reasonable expectation of privacy in a lunchbox. 101 C.A.3d at 448, n.5. Likewise, in *People v. Fick,* 80 Daily Journal D.A.R. 1955 (C.A.2d, July 1, 1980) the California Court of Appeal held that there was no reasonable expectation of privacy in the contents of a paper bag seized during an automobile search.

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[2]At first impression this seems reasonable. Nevertheless, almost anyone would regard it as an invasion of privacy if government agents took a closed soft drink container from them and inspected its contents.

Federal Circuit decisions are just as perplexing. In *United States v. Dien*, 609 F.2d 1038 (1979), for example, the Second Circuit held that an occupant of a rented van had a reasonable expectation of privacy in cardboard cartons found in the back of the van which contained marijuana, *Id.* at 1045 In *United States v. Gooch*, however, the Tenth Circuit held that an occupant of a small airplane could have no reasonable expectation of privacy in large plastic sacks containing marijuana since *Sanders* applies to luggage and not "mere cargo." *Id.* at 126.

In view of this array of opinions among appellate justices about what is a reasonable expectation of privacy it may be questioned whether it is consistent with Fourth Amendment policy to entrust the officer in the field with the authority to draw inferences from facts presented to him to determine whether a reasonable expectation of privacy exists in a particular case. The point of the Fourth Amendment, according to Mr. Justice Jackson, is that these types of determinations are to be drawn by a neutral magistrate:

> "The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime . . . When the right of privacy must yield to the right of search is as a rule, to be decided by a judicial officer, not by a policeman or government enforcement agent. *Johnson v. United States*, 333 U.S. 10, 13-14.

Carving out a special warrant requirement for one type of private property, found in an automobile, but not for others, may, likewise, be inconsistent with the most basic Fourth Amendment principle, recognized in *Arkansas v. Sanders*, that

> "In the ordinary case . . . a search of private property must be both reasonable and performed pursuant to a properly issued search warrant." 442 U.S. at ..... .

Variations from this rule constitute an exception from the Warrant Clause. These "few 'jealously and carefully' drawn exceptions provide for those cases where the societal costs of obtaining a warrant . . . outweigh the reasons for prior recourse to a neutral magistrate." *Arkansas v. Sanders, id.* at ...., 61 L.Ed.2d at 242. What, therefore, are the "societal costs of obtaining a warrant" which justify the need for carving out an exception from the Warrant Clause for certain types of property found in an automobile?

Arkansas v. Sanders, indeed, appears to hold that the extent to which the Warrant Clause applies, depends not at all upon whether it is seized from an automobile:

> "Our decision in this case means only that a warrant generally is required before personal luggage can be searched and that the extent to which the Fourth Amendment applies to containers and other parcels depends not at all upon whether they are seized from an automobile." 442 U.S. at ....., n.13.

But if this is the case, then the Warrant Clause would apply to practically all private property found in an automobile, absent proof that the property fell within one of

the traditional exceptions. When an arrest is made without a search warrant, for example, a warrantless search may be made only of the area within the person's immediate control. *Chimel v. California*, 395 U.S. 752 (1969). No "reasonable expectation of privacy" test has ever been applied to the property outside that area. In such cases, the Warrant Clause ordinarily applies to all private property owned by the individual irrespective of whether the property is contained within a container. Thus, if a man is arrested in his home without a search warrant, absent proof of some exception to the Warrant Clause, the police may not pull apart his mattress, his stuffed chair, his potted plants, or his TV looking for contraband on the alleged ground that these are not "common repositories for personal effects." *See Chimel v. California*, 395 U.S. 752 (1969); *United States v. Christophe*, 470 F.2d 865 (1972). Why then should a different test apply in a man's automobile or truck? What are the "identified needs of society", *Arkansas v. Sanders*, 442 U.S. at .....; 61 L.Ed.2d at 242 which would authorize this type of warrantless search simply because the objects were found in an automobile?

For the exclusionary rule to achieve its stated constitutional objective, there must be clear constitutional standards for the police to follow. As is evidenced by the Court of Appeal decision in this case, the "reasonable expectation of privacy" test provides no guidance. While the rule suggested by Justice Blackmun—permitting warrantless searches of all property found in an automobile—would obviously serve this purpose, that approach was rejected

by the Court in *Arkansas v. Sanders*. The most clear-cut alternative would therefore be to hold that there is a reasonable expectation of privacy as to all private property seized in an automobile unless the property falls within the "plain view" exception to the Warrant Clause. *See, Harris v. United States*, 390 U.S. 234, 236 (1968) (per curiam).

Whatever this Court's decision may be as to what ultimate constitutional standard applies to searches of private property taken from an automobile search, there is no question that a clear constitutional standard and further guidance from this Court is required.

III

THE DICTA IN ARKANSAS v. SANDERS PERMITTING POLICE TO MAKE WARRANTLESS SEARCHES BASED UPON INFERENCES DRAWN FROM THE TYPE OF CONTAINER INVOLVED IS SUBJECT TO MISUNDERSTANDING, AS ILLUSTRATED BY THE MISUNDERSTANDING OF THE COURT BELOW, AND SHOULD BE EXPLAINED

To appreciate the scope of the California Court of Appeal's ruling, it must be kept in mind, as Justice Rattigan states, that each of the packages simply "presents . . . the visual impression of a package that had been tightly wrapped for shipment by mail." (Dissenting Opinion at 11, App.). Two members of the Court of Appeal, however, interpret *Arkansas v. Sanders* to hold that a package of this type of almost any size and weight is outside the Warrant Clause so long as someone is capable of drawing an

inference regarding its contents. Previously, however, it was well established that the protection of the Warrant Clause applied to all "letters and sealed packages . . . closed against inspection, wherever they may be." *Ex parte Jackson,* 96 U.S. 727, 733; 24 L.Ed. 877 (1878); *United States v. Van Leeuwen,* 397 U.S. 249; 25 L.Ed.2d 282 (1970); *United States v. Chadwick,* 433 U.S. 1, 10 (1977). Petitioner submits that this breach with the prior law points to a need for guidance by this Court.

The Court of Appeal found that there was no reasonable expectation of privacy in the taped, secured packages because Officer DePue "testified that he had heard that contraband was commonly packaged this way." (Opinion at p. 4-5, App.). Relying upon language in footnote 13 of *Arkansas v. Sanders, supra,* the Court of Appeal held that a finding of no reasonable expectation of privacy is appropriate when the police can infer the contents of the package from its outer appearance and that DePue's statement indicated that he could do so.

The language in *Arkansas v. Sanders* relied upon by the California Court of Appeal states:

> "[S]ome containers (for example a kit of burglar tools or a gun case) by their very nature cannot support a reasonable expectation of privacy because their contents can be inferred from their outward appearance." *Arkansas v. Sanders,* 442 U.S. at ....., n. 13.

Unfortunately, the examples drawn by this Court are not extremely useful. Although no descriptions of a kit of burglar tools can be found in standard texts on criminal investigation, it seems reasonable to assume that such a kit

is either a rolled pouch with inside pockets secured by straps or a case with room for tools therein. The first type of container might resemble an innocent tool pouch or silverware roll, while the second might be indistinguishable from a tool box or fishing tackle box.

A gun case might receive rather special treatment under the Fourth Amendment. For their own protection, and for no other reason, the police might be entitled to search a gun case found in an automobile based upon probable cause alone. But why should such principles apply to a guitar case or a shoe box or any other container which may permit inferences but not certainly about the contents of the container?

To infer means to use the power of reason to deduce something from known facts. The constitutional policy of the Warrant Clause, however, consists in requiring that "the usual inferences which reasonable men draw from evidence . . . be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime." *Johnson v. United States*, 333 U.S. 10, 13-14. Thus the policy of the Warrant Clause requires that the magistrate and not the police draw the inferences from the outward appearance of the container.

This was the rule applied in *United States v. Chadwick*, 433 U.S. 1 (1977). In that case, police were clearly able to infer the contents of the footlocker from outward appearances as well as other reliable information. Talcum powder, known to be used to cover up the odor of marijuana, was leaking and a trained dog had signalled the

presence of marijuana. Yet a warrant was held to be required.

This has always been the rule under the Warrant Clause. The exterior of a container may provide probable cause about the contents of the container, but until the contents are plainly known by the senses, there is still nothing more than probable cause. No amount of probable cause, standing alone, is sufficient to justify a search without a warrant.

> "In enforcing the Fourth Amendment's prohibition against unreasonable searches and seizures, the Court has insisted upon probable cause as a minimum requirement for a reasonable search permitted by the Constitution. As a general rule, it has also required the judgment of a magistrate on the probable-cause issue and the issuance of a warrant before a search is made. Only in exigent circumstances will the judgment of the police as to probable cause serve as sufficient authorization for a search." *Chambers v. Maroney*, 399 U.S. 42, 51 (1970).

If a special rule is to be established, permitting warrantless searches based upon the outward appearance of a container, just how much probable cause will be required? How will such a standard be applied?

Petitioner submits that the only rule regarding outward appearances of property which is both consistent with the constitution and workable is the plain view rule. Dicta in *Arkansas v. Sanders, supra,* however, cast doubt upon this, creates confusion regarding the traditional rule that probable cause standing alone does not justify a warrant and invites the police to find new avenues to avoid the warrant

requirement. Petitioner requests the court to grant the petition in order to resolve these misunderstandings which otherwise will provide a continuing source of disputes in lower courts concerning the Warrant Clause.

CONCLUSIONS

Although the general principles applicable to claims of Fourth Amendment violations are deemed well-settled, there is widespread uncertainty and confusion over how to apply these principles to cases involving private property taken from a highway stop and arrest. *Arkansas v. Sanders,* 442 U.S. 753 has resolved most of the uncertainty in cases involving luggage. Nevertheless, while automobile searches occur every hour of the day, only a small percentage of the property found in automobiles constitute luggage.

Dicta in a footnote in *Arkansas v. Sanders* presages the possibility that non-luggage searches may be governed by a test of whether the property is a container "supporting a reasonable expectation of privacy." A further test may be whether the contents of the container "may be inferred" from outward appearances.

These tests, while possibly well founded under certain Fourth Amendment principles, do not resolve the uncertainty. On the contrary, as is evidenced by the facts of the case, without further guidance from this Court these tests are constitutional wild cards. Until these highly subjective tests are explained or limited, they threaten to eclipse the most basic Fourth Amendment principles: the principle that in the ordinary case inferences are to be drawn by

the magistrate and not the police, the principle that in the ordinary case searches of private property must be performed pursuant to a warrant, and the principle that in the ordinary case no amount of probable cause, standing alone, is sufficient to justify a warrantless search.

Petitioner furthermore submits that behind the mistakes of law and despite the choice of labels the California Court of Appeal has violated this Court's mandate by reinstating their judgment on grounds which tend to nullify and undermine the review process of this Court.

For these reasons a Writ of Certiorari should be granted.

Dated: July 29, 1980

Respectfully submitted,
JOSEPH G. BAXTER
MARSHALL W. KRAUSE
Attorneys for Petitioner

(Appendix follows)

APPENDIX

In the Court of Appeal of the State of California
First Appellate District, Division Four

See Dissenting Opinion

1 Crim. No. 14387
(Sup. Ct. No. 10357)

People of the State of California,
Plaintiff and Respondent,
vs.
Jeffrey Richard Robbins,
Defendant and Appellant.

[Filed March 4, 1980]

Jeffrey Richard Robbins appeals from a judgment of imprisonment which was rendered after a jury found him guilty of possession of marijuana (Health & Saf. Code § 11357), possession of marijuana for sale (Health & Saf. Code, § 11359), and transportation of marijuana (Health & Saf. Code, § 11360).

On May 9, 1978, in an unpublished decision, this court modified the judgment to stay the sentence for possession of marijuana for sale, and affirmed the judgment as modified.

The United States Supreme Court subsequently dealt with the problem of search of a closed container found in an automobile in *Arkansas v. Sanders* (1979) 422 U.S.

.....[1] [61 L.Ed.2d 235; 99 S.Ct. 2586]. The court then granted certiorari in the present case, vacated this courts' decision and remanded the cause to us for further consideration in light of *Arkansas v. Sanders*.

Although the appeal is from a judgment after trial, the principal challenge is to the propriety of a pretrial order denying a motion to suppress evidence (Pen. Code, § 1538.5). Therefore the following narrative is based not on the trial record, but on the evidence received at the hearing on the motion to suppress evidence.

On January 5, 1975, at 1:45 a.m., California Highway Patrol Officer DePue and Sergeant Stoltz stopped appellant's station wagon on Nelson Road in Solano County. Appellant had been driving erratically. He immediately left his car, meeting DePue halfway between the vehicles. The officer asked appellant for his operator's license and ownership registration. Appellant began talking very rapidly and had difficulty in removing his license from his wallet. DePue followed appellant to the car, and smelled marijuana smoke when appellant opened the door.

Officer DePue patted appellant down for weapons and found only a vial of liquid. The officer saw a pair of tweezers on the front seat of the vehicle, of a type used to hold marijuana roaches. He retrieved the tweezers; appellant then began to vomit in the road. In the passenger compartment DePue found a pair of tweezers holding a burned hand-rolled cigarette butt, an alligator clip, a hand-rolled cigarette, and a cookie tin which contained marijuana

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[1]Advance Report Citation: 47 U.S.L.Week 4783.

seeds, two packs of cigarette papers, and a plastic baggie containing marijuana.

While Officer DePue was searching the passenger compartment, appellant said to Sergeant Stoltz, "What you are looking for is in the back." The officers then placed appellant in the patrol car and DePue opened the luggage compartment of appellant's automobile. DePue found a tote bag and two bulky packages wrapped in plastic. DePue opened all of the packages. Each of the plastic-wrapped parcels contained approximately fifteen pounds of marijuana; the tote bag contained approximately three pounds.

I

It was lawful for the officers to stop appellant's car to determine why it was moving erratically (*People v. Boddie* (1969) 274 Cal.App.2d 408). Search of the automobile was proper when the officers learned that appellant was smoking marijuana when they stopped him.

The record establishes that when Officer DePue saw the containers in the back of the car he had probable cause to believe that they contained contraband.

Appellant contends that the Supreme Court's mandate to consider this case in light of *Arkansas v. Sanders* compels the suppression of all the marijuana found in his automobile. The Attorney General concedes that the cookie tin retrieved from the passenger compartment and the tote bag found in the luggage compartment were both closed containers for which a warrant was required under *Arkansas v. Sanders,* but contends that the plastic-wrapped

parcels were not protected by the Fourth Amendment because they were readily identifiable as marijuana bricks.

In *Arkansas v. Sanders,* the United States Supreme Court held that, absent exigent circumstances, a warrant is generally required to search closed containers removed from an automobile properly stopped in the field and searched for contraband. (Accord, *People v. Dalton* (1979) 24 Cal.3d 850, cert. applied for Dec. 1979, Supreme Ct. Dock. No. 79-930.) The court declared, however, that "[n]ot all containers and packages found by police during the course of a search will deserve the full protection of the Fourth Amendment. Thus, some containers (for example a kit of burglar tools or a gun case) by their very nature cannot support any reasonable expectation of privacy because their contents can be inferred from their outward appearance. Similarly, in some cases the contents of a package will be open to 'plain view,' thereby obviating the need for a warrant." (442 U.S. at p. ..... n. 13[2] [61 L.Ed.2d at p. 245; 99 S.Ct. at p. 2593].)

Appellant argues that the contents of the plastic-wrapped packages were not in plain view. Indeed there was no testimony that the plastic wrapping was sufficiently transparent to reveal its contents. But the packages did not support a reasonable expectation of privacy.[3] Officer DePue described the package as "green-wrapped plastic blocks," and testified that he had heard that contraband

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[2]47 U.S.L.Week 4783, at p. 4786.

[3]*Arkansas v. Sanders, supra,* involved a suitcase; also see *People v. Minjares* (1979) 24 Cal.3d 410, cert. den. . . . U.S. . . . [Advance Report Citation: 48 U.S.L.Week 3222] (zippered tote bag); *People v. Pace* (1979) 92 Cal.App.3d 199 (closed lunch box).

was commonly packaged this way.[4] The packages were received in evidence at the preliminary hearing. At the subsequent suppression hearing the preliminary hearing testimony was stipulated into evidence, and the exhibits were also received, "under the same numbers they were marked at the preliminary hearing." We have not examined the packages, but the trial record does include a photograph of them in place in appellant's car. The bulky tape-secured packages do not present an appearance of containing anything other than contraband. The court could reasonably conclude that the contents of the packages could have been inferred from their outward appearance, so that appellant could not have held a reasonable expectation of privacy with respect to the contents.

Appellant contends that diverse legally possessable objects could be wrapped in green plastic, citing *Remers v. Superior Court* (1970) 2 Cal.3d 659. In *Remers,* the California Supreme Court held that a suspect's act of showing a tinfoil package to a companion did not provide probable cause for an arrest following which an incidental search revealed the package to contain seconal tablets. The prosecution argued that the officer knew that dangerous drugs

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[4]Redirect examination of DePue:

"Q. . . . You stated in response to Mr. Ross' question, when you first saw this brown tote bag there was nothing unusual about it; nothing about these two plastic wrapped green blocks that attractd your attention?

"A. I had previous knowledge of transportation of such blocks. Normally contraband is wrapped this way, merely hersay. I had never seen them before.

"Q. You had heard contraband was packaged this way?

"A. Yes."

are often packaged in tinfoil, but the court held that a tinfoil package is so commonly used for legitimate purposes, such as to wrap food or tobacco, that it in itself is not a suspicious circumstance. (*Id.*, at pp. 665-666.) *Remers* is to be distinguished from the present case. Unlike a small tinfoil package, the very appearance of a bulky, fifteen pound, brick-shaped, plastic-wrapped package suggested that it contains a specific type of contraband (a brick of marijuana). Although a variety of legally possessable objects could conceivably be wrapped in brick-shaped, plastic-wrapped packages, legally possessable objects are not *commonly* packaged in this manner, as are food and tobacco commonly wrapped in tinfoil. Any experienced observer could have inferred from the appearance of the packages that they contained bricks of marijuana. The parcels thus could not support a reasonable expectaton of privacy and were not protected by the Fourth Amendment.

The Attorney General has conceded that suppression of the cookie tin found in the passenger compartment and the tote bag found in the luggage compartment is mandated by *Arkansas v. Sanders*. But erroneous denial of a suppression motion and admission of evidence does not require reversal if the error was harmless. (*People v. Tarantino* (1955) 45 Cal.2d 590, 595; *People v. Daniels* (1971) 16 Cal.App.3d 36, 45.) The amount of marijuana in the improperly searched containers (about three pounds) was insignificant when compared with that contained in the lawfully searched plastic-wrapped packages (about thirty pounds). It is certain beyond reasonable doubt that the error did not affect the verdict on the

transportation count. The jury would have reached the same verdict as to the transportation count upon thirty pounds of marijuana as it did upon thirty-three pounds. Therefore, the Fourth Amendment point does not justify reversal of the judgment on that count. (See *Chapman v. California* (1967) 386 U.S. 18, 24.)

II

Appellant contends that the trial court erred when it refused to consider his renewed motion to suppress made during trial. It is clear that once a defendant's motion to suppress evidence has been denied at a special Penal Code section 1538.5 hearing in the superior court, the trial judge should not entertain a renewed motion at trial unless there is an interevening charge in the applicable law or the discovery of new evidence.[5] (*People v. Superior Court* (1971) 4 Cal.3d 605, 610, reh. den. 386 U.S. 987.)

On the second day of the trial, defense counsel moved to suppress evidence, asserting that the posted speed limit at the site of the arrest is 35 miles per hour rather than 55 miles per hour. The defense argued that this discovery destroyed the probable cause necessary for the initial stop. The motion was denied. Appellant contends that this is new evidence within the meaning of Penal Code section 1538.5, subsection (h), and that the motion should have been granted.

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[5]Penal Code section 1538.5, subdivision (h):

"If, prior to the trial of a felony or misdemeanor, opportunity for this motion did not exist or the defendant was not aware of the grounds for the motion, the defendant shall have the right to make this motion during the course of trial in the municipal, justice or superior court."

The California Supreme Court in *People v. Martinez* (1975) 14 Cal.3d 533, 537, recognized a "due diligence" limitation on the availability of a belated motion to suppress under section 1538.5, subdivision (h). The court held that a motion to suppress raised at trial was properly denied when based on information defense counsel could have obtained at any time simply by interviewing his client. The present case is similar. It may be questioned whether appellant realized the actual speed limit prior to trial. However, it is clear that defense counsel could have discovered the true speed limit simply by visiting the scene of the arrest, an act which falls within the scope of due diligence. Under the *Martinez* limitation, appellant's motion to suppress at trial was properly denied. (See *People v. Burke* (1974) 38 Cal.App.3d 708, 713.)

III

Appellant contends and respondent concedes that the sentence must be stayed as to the possession for sale count. In *People v. Sanders* (1967) 250 Cal.App.2d 123, and *In re Adams* (1975) 14 Cal.3d 629, the court recognized that while possession for sale is a crime separate from transporting, where both were part of an indivisible course of conduct which has a single objective double punishment would violate Penal Code section 654.

Appellant further contends that the offense of possession must be included within the offense of possession for sale. The jury found appellant guilty of separate counts of possession and possession for sale, upon evidence which would support a determination that appellant possessed distinct quantities of marijuana for different purposes: a

small amount in the cookie tin in the front of the car for personal use, and a large amount in the sealed packages in the baggage compartment for sale. But the contents of the cookie tin should have been suppressed under *Arkansas v. Sanders*. The only physical evidence available to support the verdicts was the marijuana in brick form found in the baggage compartment. Therefore, appellant's contention with respect to the charge of simple possession must be upheld.

IV

Appellant argues that California's marijuana laws are unconstitutional. Constitutional challenges to the marijuana laws have consistently been rejected. (See *People v. Oatis* (1968) 264 Cal.App.2d 344, cert. den. 393 U.S. 1108; *People v. Aguiar* (1968) 257 Cal.App.2d 597, cert. den. 393 U.S. 970; *People v. Glaser* (1965) 238 Cal.App.2d 819, cert. den. 385 U.S. 880, reh. den. 385 U.S. 965.) In a related contention it is argued that trial counsel manifested constitutional inadequacy when he failed to challenge the validity of the laws proscribing marijuana. It is not an indication of inadequacy for counsel to withhold making an unsound argument.

The purported appeal from the order denying the motion to suppress evidence is dismissed. The judgment is reversed as to the count of simple possession. The sentence as to the count of possession for sale is stayed. Upon such modification the judgment is affirmed as to the counts of possession for sale and of transportation.

Certified for publication.

Christian, J.

I concur:

Caldecott, P. J.

I respectfully dissent. I agree that the judgment of conviction must be reversed as to the contents of the cookie tin found in the passenger compartment of appellant's station wagon, and as to the contents of the tote bag found in the luggage compartment, but I reach the same conclusion as to the contents of the "plastic wrapped" packages found with the tote bag. Because I would therefore reverse the judgment in its entirety, contrary to part I of the majority opinion, I need not reach the points discussed in parts II and III.

In declaring closed containers to be generally within the protection of the Fourth Amendment against warrantless searches, the United States Supreme Court excepted only those containers which "by their very nature cannot support any reasonable expectation of privacy because their contents can be inferred from their outward appearance." (*Arkansas v. Sanders* (1979) ..... U.S. ....., ... [61 L.Ed.2d 235, 245], fn. 13 [quoted in the majority opinion].) The most demonstrative evidence of the "outward appearance" of the two packages in question is the photograph mentioned in the majority opinion. It depicts only one of the packages as Officer DePue found them among a cluttered array of articles in the luggage compartment, but his testimonial description supports the inference that the packages were identical in appearance.

The package visible in the photograph is apparently wrapped or boxed in an opaque material covered by an outer wrapping of transparent, collophane-type plastic. (The photograph is not in color, and the "green" plastic cannot be seen at all.) Both wrappings are sealed on the

outside with at least one strip of opaque tape. As thus wrapped and sealed, the package roughly resembles an oversized, extra-long cigar box with slightly rounded corners and edges. It bears no legend or other written indicia supporting any inference concerning its contents.

The photograph thus presents to me the visual impression of a package that had been tightly wrapped for shipment by mail, or to protect its contents, or for both purposes. For all that I see, it could contain books, stationery, canned goods, or any number of other wholly innocuous items which might be heavy in weight. In fact, it bears a remarkable resemblance to an unlabelled carton of emergency highway flares that I bought from a store shelf and have carried in the trunk of my own automobile.

For these reasons, I perceive nothing about the packages which dispels "any reasonable expectation of privacy because their contents can be inferred from their outward appearance." (*Arkansas v. Sanders, supra,* ..... U.S. ..... at p. ..... [61 L.Ed.2d 235 at p. 245], fn. 13.) I cannot plausibly distinguish them from the closed containers to which the California Supreme Court unanimously extended Fourth Amendment protection under virtually identical circumstances, and on the authority of *Arkansas v. Sanders*, in one of the decisions cited in the majority opinion. (*People v. Dalton* (1979) 24 Cal.3d 850, 854 [describing a "large silver colored metal box," a "silver-gray metal box," and a "brown leather box," all of which were found in the trunk of an automobile and opened by police officers]. See also *id.*, at pp. 855-857

[invalidating the officers' warrantless search of the "boxes"].)*

The only conceivable support for the majority's contrary conclusion is Officer DePue's testimony to his "merely hearsay" impression that "[n]ormally contraband is wrapped this way," which he had "never seen" himself. He also testified that he had received limited training at the California Highway Patrol Academy, "three times," on how to identify the "odor of burned marijuana." The record does not show that he had any training on how marijuana or other contraband is "normally wrapped," nor that his "hearsay" impression on that subject was received from any reliable source, nor that he developed it in the course of his experience in law enforcement.

Given this limited authenticating background, the officer's "hearsay" certification would not have supported the issuance of a valid warrant authorizing a search of packages with the outward appearance shown here. Given the same background, I am unwilling to rely on the "hearsay" as a basis for determining that he could constitutionally open and search the packages without any warrant at all. Lacking "exigent circumstances" as well (see my footnote, *ante*), I conclude that the sealed packages were protected by the Fourth Amendment and

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*This decision also controls a significant companion point in the present case. The officers who arrested appellant had handcuffed him and positioned him away from the station wagon before its luggage compartment was opened. *Dalton* therefore establishes that there were no "exigent circumstances" justifying a warrantless search of the packages found in the compartment. (*People* v. *Dalton*, *supra*, 24 Cal.3d at p. 857.)

that their contents should have been suppressed. (*Arkansas v. Sanders, supra,* ..... U.S. ..... at pp. ....-..... [61 L.Ed.2d 235 at pp. 244-246]; compare *id.*, at p. ..... [61 L.Ed.2d at p. 245], fn. 13; see also *People v. Dalton, supra,* 24 Cal.3d 850 at pp. 855-858; *People v. Minjares* (1979) 24 Cal.3d 410, 423-424.) I would accordingly reverse the judgment of conviction in its entirety.

RATTIGAN, J.

Order Due
May 2, 1980

Order Denying Hearing
After Judgment by the Court of Appeal
1st District, Division 4, Crim. No. 14387

In the Supreme Court of the State of California

IN BANK

People

v.

Robbins

[Filed April 30, 1980]

Appellant's petition for hearing DENIED.

Bird, C.J., and Tobriner, J., are of the opinion that the petition should be granted.

/s/ BIRD

Chief Justice